

NYNEX TELEPHONE COMPANIES

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
)

1994 Annual Access Tariff Filings)

CC Docket No. 94-65

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**OPPOSITION TO AT&T'S
APPLICATION FOR REVIEW**

The NYNEX Telephone Companies ("NYNEX")¹ hereby file their Opposition to the Petition of AT&T Corp. ("AT&T") for Review of the Common Carrier Bureau's *June 24 Orders* in this proceeding.² AT&T asks the Commission to review and reverse the Bureau's decision not to require the local exchange carriers ("LECs") to make exogenous cost changes for the amortization of equal access cost recovery ("EACR") amounts.

¹ The NYNEX Telephone Companies are New England Telephone and Telegraph Company and New York Telephone Company.

² See 1994 Annual Access Tariff Filings, CC Docket No. 94-65, Memorandum Opinion and Order, DA 94-706, released June 24, 1994; 1994 Annual Access Tariff Filings, CC Docket No. 94-65, Memorandum Opinion and Order, DA 94-707, released June 24, 1994 ("June 24 Orders").

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AT&T's petition should be denied as an untimely petition for reconsideration of the *LEC Price Cap Order*³ and the *LEC Price Cap Reconsideration Order*.⁴ In these orders, the Commission dealt with precisely the same issue that AT&T raises in the instant petition. The commenters in those proceedings had requested that the Commission require the LECs to make exogenous cost adjustments for EACR costs. As AT&T concedes, the Commission rejected these requests. If AT&T thought that the Commission's decisions were erroneous, it should have filed a timely petition for further reconsideration.⁵ AT&T's Application for Review, filed over three years after the Commission adopted the *LEC Price Cap Order* and the *LEC Price Cap Reconsideration Order*, obviously fails to meet the procedural requirements for seeking to reverse these decisions.

AT&T tries to get around this procedural obstacle by claiming that the Commission's Price Cap rules permit any party to request exogenous treatment of any cost change.⁶ AT&T cites Section 61.45(d), which lists several categories of exogenous cost changes and which states that exogenous cost changes include "such tax law changes and other extraordinary cost changes as the Commission shall permit or require." AT&T argues that the Bureau should have used this provision to revisit the issue of EACR costs. This is incorrect. The Bureau may

³ *Policies and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990) ("LEC Price Cap Order").

⁴ *Policies and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 2637 (1991) ("LEC Price Cap Reconsideration Order").

⁵ Petitions for reconsideration of rulemakings must be filed within 30 days of public notice of the Commission's action. See 47 C.F.R. Section 1.429(d).

⁶ See AT&T Petition at pp. 10-11.

not indirectly modify a rule that was adopted in a notice and comment rulemaking proceeding. The Commission's decision to deny exogenous cost treatment of EACR costs was part of the rules adopted in the LEC Price Cap proceedings. In the *June 24 Orders*, the Bureau properly found that it could not change the rule on EACR costs without another rulemaking proceeding or without a LEC petition to waive the rule.⁷ AT&T's artful attempt to evade the procedural requirements concerning rulemakings should be rejected.

AT&T also tries to evade the procedural rules by arguing that the *LEC Price Cap Order* and *LEC Price Cap Reconsideration Order* did not address the specific issue that it is raising in this petition. AT&T argues that the *LEC Price Cap Order* only dealt with the issue of allowing exogenous cost treatment of "ongoing costs of converting to equal access" rather than with the amortization of EACR costs incurred prior to the adoption of the Price Cap rules.⁸ That is not an accurate interpretation of the order. The LECs had not finished converting to equal access in 1990, and the non-capitalized EACR costs that they incurred after 1990 were also to be amortized over the remainder of the 8 year period ending on December 31, 1994.⁹ In the *LEC Price Cap Order*, the Commission expressed its concern that if it allowed exogenous treatment of EACR costs, the LECs might

⁷ See *June 24 Orders*, DA 94-706, at para. 56.

⁸ See AT&T at pp. 7-8, citing *LEC Price Cap Order* at para. 180..

⁹ The Commission had decided earlier that the LECs should amortize their non-capitalized EACR costs over a fixed 8 year period ending December 31, 1994. See *Petitions for Recovery of Equal Access Costs, Memorandum Opinion and Order*, FCC 85-628 (1986).

have an incentive to inflate the costs in this category. The Commission was well aware that its decision not to treat EACR costs exogenously would affect both the EACR costs to be incurred as well as to the expiration of the amortization of those costs. AT&T's interpretation of the Commission's decision is inconsistent with the facts.

AT&T also argues that the *LEC Price Cap Reconsideration Order* is not dispositive of this issue because the Commission's decision to reject exogenous treatment of EACR costs was based on the lack of an adequate factual record.¹⁰ According to AT&T, the factual record is now complete because the Commission can establish at this point that the LECs have fully recovered their EACR costs. Therefore, AT&T argues that the Bureau committed error in relying upon the *LEC Price Cap Reconsideration Order* to deny AT&T's request for exogenous treatment of EACR cost amortizations.

AT&T misinterprets the Commission's actions. The Bureau properly relied upon the *LEC Price Cap Reconsideration Order* because the parties seeking reconsideration of the *LEC Price Cap Order* raised precisely the issue that AT&T raises here. In its Petition for Reconsideration, MCI argued that the Commission should treat the expiration of the amortization of EACR costs as exogenous, because the LECs would recover all of their EACR costs by January 1, 1994.¹¹ Therefore, MCI argued that the Commission should require the LECs to adjust

¹⁰ See AT&T Petition at pp. 9-10.

¹¹ See MCI Petition for Reconsideration, CC Docket No. 87-313, filed November 21, 1990, at pp. 31-32.

their price cap indexes in their 1994 Annual Access Tariff Filings to remove the impact of EACR costs in their rates.¹² In the *LEC Price Cap Reconsideration Order*, the Commission rejected MCI's suggestion because it found that EACR costs were similar to depreciation costs, which are not treated as exogenous despite the fact that depreciation expenses cease when a piece of equipment is retired. The Commission had found that the LECs have some degree of control over depreciation costs, and that it was not clear that they did not have control over EACR cost levels as well. Therefore, the Commission conclusively decided that EACR costs should not be exogenous.


The "meager factual record" noted by the Commission in that order concerned the issue of control. The new factual record offered by AT&T in the instant petition is that the LECs have fully recovered their EACR costs -- an event which MCI described in its 1990 petition, and which the Commission knew would happen because that is what its rules required. AT&T presents no facts in its Application for Review of the *June 24 Orders* that were not presented to the Commission in the LEC Price Cap Proceeding. It presents no grounds for revisiting this issue in the guise of an Application for Review of the Bureau's orders.

¹² This is the same argument that AT&T made to the Bureau in the 1994 Annual Access Tariff Filing Proceeding and which it makes to the Commission in its Application for Review.

The Bureau's *June 24 Orders* are completely consistent with the Commission's Price Cap orders. The Commission should reject AT&T's efforts to collaterally attack the LEC Price Cap orders.

Respectfully submitted,

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Dated: August 9, 1994

Certificate of Service

I hereby certify that copies of this pleading were served this date by first class U.S. mail, postage prepaid, on each of the persons indicated on the attached Service List.



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Dated: August 9, 1994

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